Supreme Court, U.S.
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No. 99-116

In the Supreme Court of the United States

JEFFREY ALLAN FISCHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a hospital that receives annual payments of between $10 and $15 million under the Medicare program is an "organization, government, or agency [that] receives * * * benefits in excess of $10,000 under a federal program involving * * * federal assistance" within the meaning of 18 U.S.C. 666(b).

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Salinas v. *United States*, 522 U.S. 52 (1997)	7, 11, 12
United States v. *Copeland*, 143 F.3d 1439 (11th Cir. 1998)	11
United States v. *LaHue*, 998 F. Supp. 1182 (D. Kan. 1998), aff'd, 170 F.3d 1026 (10th Cir. 1999)	5, 6, 8, 9, 10
United States v. *Wyncoop*, 11 F.3d 119 (9th Cir. 1993)	10, 11
United States v. *Zyskind*, 118 F.3d 113 (2d Cir. 1997)	8, 10
Westfall v. *United States*, 274 U.S. 256 (1927)	12
Wisniewski v. *United States*, 353 U.S. 901 (1957)	11

Statutes and regulation:

18 U.S.C. 371	2
18 U.S.C. 666	4-5, 10, 11
18 U.S.C. 666(a)	4
18 U.S.C. 666(a)(1)(A)	1-2
18 U.S.C. 666(a)(1)(B)	8, 11
18 U.S.C. 666(a)(2)	2, 8
18 U.S.C. 666(b)	4, 5, 6, 7, 8, 10, 11, 12
18 U.S.C. 666(c)	8
18 U.S.C. 669 (Supp. III 1997)	10
18 U.S.C. 1341	2, 10
18 U.S.C. 1343	2, 10
18 U.S.C. 1957	2
42 U.S.C. 1320a-7b	10

Statutes and regulation—Continued: Page

42 U.S.C. 1395c to 1395i-4 9
42 C.F.R. 409.5 9

Miscellaneous:

S. Rep. No. 225, 98th Cong., 2d Sess. (1984) 11

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 168 F.3d 1273.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1999. A petition for rehearing was denied on April 28, 1999 (Pet. App. 16). The petition for a writ of certiorari was filed on July 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of fraud involving an organization receiving federal funds, in violation of 18 U.S.C.

666(a)(1)(A) and 2 (count 1); one count of giving a kickback to an agent of an organization receiving federal funds, in violation of 18 U.S.C. 666(a)(2) and 2 (count 2); one count of mail fraud, in violation of 18 U.S.C. 1341 (count 3); two counts of wire fraud, in violation of 18 U.S.C. 1343 (counts 4-5); one count of conspiracy to commit the above offenses, in violation of 18 U.S.C. 371 (count 6); and seven counts of money laundering, in violation of 18 U.S.C. 1957 (counts 7-13). He was sentenced to 65 months' imprisonment, to be followed by three years of supervised release. He was ordered to pay $1.2 million in restitution. The court of appeals affirmed. Pet. App. 1-15.

1. Petitioner was president and a partial owner of QMC, a private company that performed billing audits for health care providers. In 1993, he arranged for QMC to obtain a $1.2 million loan from West Volusia Hospital Authority (WVHA). WVHA is a county agency responsible for operating two hospitals. In 1993, it received between $10 and $15 million in payments under the Medicare program. Pet. App. 3, 7.

As security for the $1.2 million loan from WVHA, petitioner pledged QMC's accounts receivable and a $1 million letter of credit that QMC had obtained through a foreign bank, First Asia Development Bank. QMC's accounts receivable, however, had already been pledged to another QMC creditor, and the terms of the $1 million letter of credit severely limited WVHA's ability to collect on it. Petitioner negotiated the loan with WVHA's chief financial officer, Robert Caddick. Pet. App. 3.

Petitioner used the $1.2 million to repay creditors and to raise the salaries of QMC's five owner-employees, including petitioner. Petitioner also had QMC lend at least $100,000 to a company owned by the

First Asia Development Bank representative who had assisted QMC with the $1 million letter of credit. In addition, petitioner used the loan proceeds by causing QMC to open options-trading accounts, which lost about $400,000. Pet. App. 4.

After the loan was made, QMC paid $10,000 to Caddick's mother, Stella Greenfield, by a check marked "consulting fees," even though Greenfield had never performed services for QMC. Greenfield later sent the check proceeds to Caddick. Petitioner noted on the check's invoice that the check was for a "loan origination fee." Pet. App. 5. Caddick later tried to cover up QMC's $10,000 payment to him by proposing to QMC's vice president, Charles Kramer, that he backdate a bogus "contract" for programming services that Caddick had allegedly performed for QMC. *Id.* at 6.

When QMC was unable to repay the loan on its due date, petitioner persuaded First Asia Development Bank to send QMC a $1.2 million draft, which QMC endorsed and presented to WVHA. First Asia, however, refused to honor the draft when WVHA's bank presented it. Pet. App. 4-5. In December 1994, petitioner was removed from his position as president of QMC. The next month, QMC filed for bankruptcy. Pet. App. 6; Gov't C.A Br. 17.

2. The court of appeals affirmed petitioner's conviction. Pet. App. 1-15.[1] The court of appeals rejected

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[1] The court of appeals rejected petitioner's challenges to the sufficiency of the evidence, the particularity of the indictment, the admission of petitioner's prior fraud convictions, the prosecutor's statements to the jury, the district court's refusal to hold an evidentiary hearing regarding an alleged *Brady* violation, and the district court's finding that petitioner had the ability to pay restitution. Pet. App. 2 n.2. Petitioner does not challenge those rulings in this Court.

petitioner's contention that the government had failed to prove under 18 U.S.C. 666(b) that the organization affected by the defendant's prohibited acts under Section 666(a) "receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance."[2] The court of appeals explained that, under the plain terms of Section 666(b), "the 'benefits' an organization receives under a federal program can be in the form of 'a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.'" Pet. App. 11 (quoting 18 U.S.C. 666(b)). The court of appeals further explained that, in 1993, WVHA received between $10 and $15 million under the Medicare program for providing health care services to covered individuals. *Ibid.* The court thus concluded that, "[b]ecause WVHA received payments under a federal assistance program, WVHA received a type of 'benefits' expressly covered by § 666(b)." *Ibid.*

The court of appeals (Pet. App. 12-15) further rejected petitioner's reliance on *United States* v. *LaHue*, 998 F. Supp. 1182 (D. Kan. 1998).[3] In *LaHue*, the district court concluded that Section 666(b) did not apply to a group of physicians that received payments

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[2] Section 666 (18 U.S.C.) provides, in pertinent part:

Theft or bribery concerning programs receiving federal funds.

(a) Whoever, if the circumstance described in subsection (b) of this section exists—

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that—

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a state, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

[3] After the court of appeals issued its decision in this case, the Tenth Circuit affirmed the district court's decision in *LaHue*. *United States* v. *LaHue*, 170 F.3d 1026 (1999) (Pet. App. 18-32).

under Part B of the Medicare program, because the physicians' patients, rather than the physicians themselves, are the intended beneficiaries of the Medicare program and the physicians received Medicare payments solely because the patient beneficiaries had assigned their right to receive Medicare payments to the physicians. Pet. App. 12-14 (citing 998 F. Supp. at 1186-1192).

In "declin[ing] to adopt *LaHue*'s 'target recipient' analysis," the court of appeals observed that, because the record "did not clearly establish whether WVHA received funds directly from the Medicare program or received funds as an assignee under Part B or even Part A of the federal program[,] * * * there is a possibility in this case that WVHA received funds directly from the Medicare program without having been assigned the right to receive those funds by a patient." Pet. App. 14. The court further stated that, "even if WVHA received funds as an assignee, the plain language of § 666(b) does not distinguish between an organization, government, or agency that receives 'benefits' directly under a federal program and an organization, government, or agency that receives 'benefits' as an assignee under a federal program." *Ibid.* The court similarly concluded that the language of Section 666(b) does not require that the receiving organization be the "target recipient" of the federal assistance program. *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 6-16) that the millions of dollars in Medicare payments that WVHA received in 1993 are not "benefits * * * under a federal program involving * * * federal assistance" within the meaning of 18 U.S.C. 666(b), because WVHA is not the beneficiary of the Medicare program and does not administer Medicare funds. That contention is incorrect, and it does not warrant this Court's review.

Section 666(b) encompasses any "organization, government, or agency [that] *receives*, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. 666(b) (emphasis added). That language is "expansive" and "unqualified." *Salinas* v. *United States*, 522 U.S. 52, 56 (1997). The plain text of Section 666(b) does not require that the recipient of federal assistance be the intended or ultimate beneficiary of a federal program, or that the recipient administer federal funds on behalf of the government. All that is required under the provision is that the entity receive benefits under a federal assistance program in one year in an amount exceeding $10,000.

As the court of appeals explained, Section 666(b) "focuses on the source of the 'benefits', requiring that the 'benefits' have been received '*under*' a Federal program *involving* a grant, contract, subsidy, loan, guarantee, insurance, or other form of *Federal assistance*." Pet. App. 14 (quoting 18 U.S.C. 666(b)). The court of appeals therefore correctly concluded that, "in context, the use of the term 'benefits' serves to emphasize not that the recipient must be a 'target recipient', but rather that the funds must have been

received by the organization, government, or agency as part of an 'assistance' program, rather than a purely commercial transaction." *Id.* at 14-15; see also *United States* v. *Zyskind*, 118 F.3d 113, 116 (2d Cir. 1997) ("Nothing in the language of § 666 suggests that its reach is limited to organizations that were the direct beneficiaries of federal funds. The jurisdictional subsection, (b), uses the word 'receives,' rather than the phrase 'is a beneficiary of.'"). Because WVHA directly received between $10 and $15 million in payments under the Medicare program, a federal assistance program, the court of appeals correctly concluded that WVHA is an agency covered by Section 666(b).[4]

2. a. Petitioner argues (Pet. 6-12) that the decision below conflicts with *United States* v. *LaHue*, 170 F.3d 1026 (10th Cir. 1999), which held that Section 666(b) does not apply to a group of physicians who received

[4] Petitioner suggests (Pet. 10-12) that, because hospitals are reimbursed under the Medicare program for providing services to eligible patients, the payments to WVHA are excluded under 18 U.S.C. 666(c), which provides that "[t]his section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business." Petitioner does not raise, however, any issue under subsection (c) as a question presented, see Pet. i, and no such issue was addressed by the court of appeals. In any event, even assuming that subsection (c) does more than exempt routine business payments to individuals from the types of improper actions or inducements prohibited by Section 666(a)(1)(B) and (a)(2), subsection (c) would not help petitioner here. The complex statutory scheme of reimbursing hospitals under the Medicare program does not fall within the type of payments for individual services or expenses enumerated in Section 666(c). No court has held to the contrary. Cf. *LaHue*, 170 F.3d at 1029 n.5 (Pet. App. 26 n.5) (declining to address the applicability of subsection (c) to Medicare Part B payments to doctors).

funds through patient assignments of benefits under Part B of the Medicare program. See Pet. App. 18-32. The decision in *LaHue* does disagree with that aspect of the court of appeals' reasoning that concluded that "the plain language of § 666(b) does not distinguish between an organization, government, or agency that receives 'benefits' directly under a federal program and an organization, government, or agency that receives 'benefits' as an assignee under a federal program." Pet. App. 14. But that issue does not warrant resolution by this Court at the present time.

As the court of appeals explained, the record does not reveal whether WVHA received Medicare payments directly from the Medicare program or as an assignee from hospital patients. Pet. App. 14. Thus it is not clear that the factual scenario at issue in *LaHue*—physicians receiving payments through patient assignments under Medicare Part B—is present in this case. WVHA is a hospital, and the Medicare program directly reimburses hospitals for their in-patient services and related post-hospital services under Part A of Medicare. See 42 U.S.C. 1395c to 1395i-4 and 42 C.F.R. 409.5; see also *LaHue*, 170 F.3d at 1027 n.3 (Pet. App. 22 n.3) ("[p]ayment by Medicare under Part A for services rendered by a hospital * * * may only be made to the institution"), and 170 F.3d at 1031 n.7 (Pet. App. 32 n.7) ("Medicare Part A is a different scheme [from Part B] where all payments to the hospitals are direct, without the voluntary choice of the patient. We need *not* decide whether the scope of section 666 would extend to such a case.").

In any event, any inconsistency between the two decisions does not raise a question of sufficient importance to require this Court's intervention. No other court of appeals has considered the precise issue pre-

sented in this case. Furthermore, the issue has limited practical significance. Fraud involving organizations that receive Medicare funds ordinarily may be prosecuted under other federal criminal statutes, such as mail or wire fraud, 18 U.S.C. 1341, 1343; the Medicare anti-kickback statute, 42 U.S.C. 1320a-7b; or the statute prohibiting theft or embezzlement in connection with health care, 18 U.S.C. 669 (Supp. III 1997). Indeed, the government in this case successfully prosecuted petitioner under the mail and wire fraud statutes in addition to Section 666. Pet. App. 1-2 n.1. Likewise, the defendants in *LaHue* were separately prosecuted for the same conduct under the Medicare anti-kickback statute, 42 U.S.C. 1320a-7b, which prohibits certain payments for Medicare patient referrals. See *LaHue*, 170 F.3d at 1027 n.2 (Pet. App. 21 n.2).

b. Petitioner also claims (Pet. 13-16) that the decision below "[i]s [a]rguably [i]n [c]onflict" (Pet. 13) with *United States* v. *Zyskind*, *supra*, and *United States* v. *Wyncoop*, 11 F.3d 119 (9th Cir. 1993). Neither of those decisions, however, conflicts with the court of appeals' decision in this case.

In *Zyskind*, 118 F.3d at 115, the Second Circuit *rejected* the defendant's contention that Section 666(b) "does not apply with respect to organizations that are not direct beneficiaries of federal government benefits." Moreover, although the Second Circuit noted that Section 666(b) applies to organizations that administer federal funds or distribute such funds to their intended beneficiaries, *id.* at 116-117, the court did not suggest that the statute was limited to only those organizations, or would not apply to Medicare providers which directly receive federal funds.

In *Wyncoop*, the Ninth Circuit held that Section 666(b) did not apply to a private college that "never

received any federal funds under [student] loan programs," but "received only the indirect benefits associated with increased enrollment of students receiving private loans induced by federal guarantees to the private lenders." 11 F.3d at 122. By contrast, WVHA in the present case directly received $10-$15 million in Medicare payments. Pet. App. 7.[5]

3. Petitioner also contends (Pet. 6) that the court of appeals' decision is contrary to "the fundamentals of federalism," because the court's interpretation of Section 666(b) makes petitioner's theft and bribery involving a local hospital a federal crime. That contention lacks merit.

The purpose of Section 666 is "to protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery." S. Rep. No. 225, 98th Cong., 2d Sess. 369-370 (1984). In holding that Section 666(a)(1)(B) does not require the government to demonstrate that the prohibited bribe affects federal funds, this Court in *Salinas*, *supra*, concluded that the acceptance of bribes by officials of a jail housing federal

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[5] Petitioner also errs in suggesting (Pet. 9-10) that the decision below conflicts with *United States* v. *Copeland*, 143 F.3d 1439, 1441 (11th Cir. 1998), which held that a defense contractor, Lockheed, was not covered by Section 666(b) because Lockheed was "engaged in purely commercial transactions with the federal government." As the court of appeals explained, "[t]he evidence in the present case contrasts sharply with that in *Copeland*. Whereas Lockheed received federal dollars through purely commercial transactions, WVHA * * * actually received payments from the federal government under several assistance programs." Pet. App. 11. In any event, any disagreement between the court of appeals' decision below and its decision in *Copeland* would not warrant this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 901-902 (1957) (per curiam).

prisoners pursuant to an agreement with the federal government "was a threat to the integrity and proper operation of the federal program" and does not "extend federal power beyond its proper bounds." *Salinas*, 522 U.S. at 61.

Similarly here, petitioner's conduct in obtaining a loan from a Medicare provider by fraud and giving a kickback to one of the provider's agents threatened the integrity of the Medicare program. See also Pet. App. 11-12 ("our determination that WVHA is an agency receiving 'benefits' within the meaning of § 666(b) serves the statute's purpose of protecting from fraud, theft, and undue influence by bribery the money distributed to health care providers, and WVHA in particular, through the federal Medicare program and other similar federal assistance programs"). The court of appeals' interpretation of Section 666(b) therefore does not "extend federal power beyond its proper bounds." *Salinas*, 522 U.S. at 61; see also *Westfall* v. *United States*, 274 U.S. 256, 258- 259 (1927) (Holmes, J.) (upholding constitutionality of statute criminalizing misapplication of funds of state banks belonging to Federal Reserve System).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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